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INTEREST OF *AMICUS CURIAE* MISSOURI NURSES ASSOCIATION

The Missouri Nurses Association ("MONA") is the only professional organization for the 55,000 licensed registered nurses who provide healthcare to Missouri citizens. The ruling in *Schembre v. Mid-America Transplant Association, et. al* 2003 WL 21692986 (Mo. App. Ct. July 22, 2003) creates a duty and liability on the part of a nurse that has not before existed in the State of Missouri. Missouri courts have ruled that a hospital or a nurse has no duty to inform a patient of risks of surgery and alternative methods of treatment simply because he or she obtains consent to surgery. The duty to inform specifically rests with the physician and requires exercise of a delicate medical judgment. Creation of said duty will have a significant adverse impact on the practice of licensed registered nurses in Missouri. Specifically, because of heightened liability created by the Appellate Court's ruling, nurses will resist being the party responsible for providing consent forms relating to organ donation, treatment, medical procedures and the myriad of other consent forms provided in health care institutions. On behalf of Missouri nurses, MONA urges this Court to affirm the Trial Court's order granting summary judgment to Christopher Guelbert, RN.

JURISDICTIONAL STATEMENT

Amicus Curiae, the Missouri Nurses Association, hereby adopts and incorporates by reference the Jurisdictional Statement contained in the Substitute Brief of Respondents Jefferson Memorial Hospital and Christopher Guelbert, R.N.

STATEMENTMENT OF FACTS

Amicus Curiae, the Missouri Nurses Association, hereby adopts and incorporates by reference the Statement of Facts contained in the Substitute Brief of Respondents Jefferson Memorial Hospital and Christopher Guelbert, R.N.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF NURSE CHRISTOPHER GUELBERT AND AGAINST APPELLANT BECAUSE THE UNIFORM ANATOMICAL GIFT ACT DOES NOT CREATE AN INDEPENDENT CAUSE OF ACTION AGAINST INDIVIDUALS WHO REQUEST ORGAN DONATIONS AND UNDER MISSOURI COMMON LAW NURSES DO NOT OWE A DUTY TO PATIENTS OR THOSE ACTING ON THEIR BEHALF TO OBTAIN INFORMED CONSENT.

Ackerman v. Lerwick, 676 S.W. 2d 318, 320-321 (Mo. Ct. App. 1984)

Donald v. Swann, 24 Ala.App. 463, 137 So. 178 (Ala. App. 1931)

Gouveia v. Phillips, et. al., 823 So.2d 215, 223 (Dist. Ct. App. FL 2002)

Hershley v. Brown, 655 S.W.2d 671, 676 (Mo. Ct. App. 1983)

Howard v. University of Medicine and Dentistry of New Jersey, et al.,
172 N.J. 537, 546 (Sup. Ct. NJ 2002)

Mahurin v. St. Luke's Hospital of Kansas City,
809 S.W.2d 418, 422 (Mo. Ct. App. 1991)

Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (Minn. 1905)

Phelps v. Bross, 73 S.W.3d 651, 656 (Mo. Ct. App. 2002)

Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (Ill. App. 1906)

Rainer v. Buena Community Mem. Hospital,

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF NURSE CHRISTOPHER GUELBERT AND AGAINST APPELLANT BECAUSE THE UNIFORM ANATOMICAL GIFT ACT DOES NOT CREATE AN INDEPENDENT CAUSE OF ACTION AGAINST INDIVIDUALS WHO REQUEST ORGAN DONATIONS AND UNDER MISSOURI COMMON LAW NURSES DO NOT OWE A DUTY TO PATIENTS OR THOSE ACTING ON THEIR BEHALF TO OBTAIN INFORMED CONSENT.

The Court of Appeals affirmed the order of the trial court granting summary judgment to the organ procurement agency, Mid-America Transplant Association ("MTS"), on the grounds that it had statutory immunity for its act of harvesting the deceased's organs. The Appellate Court reversed the trial court's order granting summary judgment for Nurse Guelbert because "there are genuine issues of material fact as to whether Guelbert was negligent in his explanation and representations to Appellant about the amount of bone to be removed from Decedent." Schembre v. Mid-America Transplant Association, et. al., 2003 WL 21692986, at *5 (Mo.App. E.D. July 22, 2003). The Court went on to hold that whether Nurse Guelbert acted "without negligence" is a question of material fact because "the record reflects a definite factual dispute as to the representations Guelbert made to Appellant in the course of procuring her consent to donate Decedent's eyes, bone, and tissue." Schembre, 2003 WL 21692986, at *6. Only

because he was designated to do so by the hospital, Nurse Guelbert performed the task under the Uniform Anatomical Gift Act, Section 194.210 et seq.,[1] ("UAGA") of "requesting" the family of the deceased to execute a document donating the deceased's organs. See §194.233.1. Hundreds of years of common law have unequivocally established that a nurse has no duty to obtain informed consent for procedures performed by physicians and others. There being no duty, there can be no breach and no issue of negligence. The Court of Appeals erred in reversing the Trial Court's grant of summary judgment to Nurse Guelbert.

At common law, an action by a patient was typically based on one of two legal theories: breach of contract for failing to perform the medical treatment promised, or battery for performing a procedure without the consent of the patient. Gouveia v. Phillips, et al., 823 So.2d 215, 223 (Dist. Ct. App. FL 2002). For example, in Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767) where the action was brought in contract, the court said:

> The evidence given does not apply to this action….The evidence is that the callous of the leg was broke without the plaintiff's consent…and therefore the action ought to have been trespass vi & amis….

By the early twentieth century, battery was well established in the United States as a cause of action for damages arising out of performing surgery without the patient's consent. Id. at 223, citing Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905)

[1] Hereafter, all statutory cites refer to Rev. Stat. Mo. (2002) unless otherwise indicated.

(unnecessary to show in action for assault that physician intended to injure plaintiff by unauthorized surgery); Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906) (action for trespass to the person); and Donald v. Swann, 24 Ala. App. 463, 137 So. 178 (1931) (surgery performed without patient's consent would be an assault and battery or trespass to the person, for which an action would lie).

"Missouri has long recognized an action in battery where the physician fails to obtain consent for a surgical procedure." Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, P.C., 690 S.W.2d 144, 154-155 (Mo. Ct. App. 1985). See also Hershley v. Brown, 655 S.W.2d 671, 676 (Mo. Ct. App. 1983), citing Rainer v. Buena Community Mem. Hospital, 18 Cal. App. 2d 240, 255, 95 Cal. Rptr. 901, 910 (1971) (operation without valid consent constitutes battery, even if surgery is performed without negligence); Mahurin v. St. Luke's Hospital of Kansas City, 809 S.W.2d 418, 422 (Mo. Ct. App. 1991) ("An operation performed without a patient's consent is a battery or trespass."). "Battery" is defined as an intended, offensive bodily contact with another. Phelps v. Bross, 73 S.W.2d 651, 656 (Mo. Ct. App. 2002). Further, to establish battery based on lack of consent to medical treatment, a plaintiff is only required to prove the occurrence of an unconsented touching. Wuerz v. Huffoker, 42 S.W.2d 652 (Mo. Ct. App. 2001). As these cases illustrate, in Missouri, an "…operation without a valid consent constitutes a battery." Hershley v. Brown, 655 S.W.2d 671, 676 (Mo. Ct. App. 1983).

Courts examining the nuances of the doctor-patient relationship have realized that conceptually a cause of action based on lack of patient consent fits better into the

framework of a professional negligence cause of action. Howard v. University of Medicine and Dentistry of New Jersey, et. al., 172 N.J. 537, 546 (Sup. Ct. NJ 2002). By the mid-twentieth century, as courts began to use a negligence theory to analyze consent causes of action, the case law evolved from the notion of consent to *informed* consent, balancing the patient's need for sufficient information with the doctors' perception of the appropriate amount of information to impart for an informed decision. Id. at 547 (emphasis added). An action based on a lack of informed consent alleges a form of medical malpractice based on the negligence of a physician in failing to meet the required standard of care in informing a patient of the risks of treatment and available alternatives. Wilkerson v. Mid-America Cardiology, 908 S.W.2d 691 (Mo. Ct. App. 1995).

Both a battery cause of action and the informed consent cause of action impose liability on the physician or surgeon who touches or performs a procedure on a patient without the patient's consent. A hospital or nurse has no duty to inform a patient of the risks of the physician's surgery or alternative methods of treatment simply because they obtain the patient's signature on the consent to surgery form. Ackerman v. Lerwick, 676 S.W.2d 318, 320-321 (Mo. Ct. App. 1984). In Ackerman, the deceased, Robert Ackerman, agreed to surgery for a vein stripping operation. A nurse took a "consent-to-surgery form" to Ackerman who signed the form. The form stated, "The nature and purpose of the operation, possible alternative methods of treatment, the risks involved, and the possibility of complication have been fully explained to me. No guarantee or assurance has been given by anyone as to the results that may be obtained." Ackerman at

321. The Court found no basis for concluding that the nurse had a duty to make an oral inquiry as to whether the rights had been explained to the patient or to ascertain the accuracy of the patient's understanding of his consent. The Court held that the duty to inform rests with the "physician and requires exercise of a delicate medical judgment." Id. at 320-321. Id. See also Wilson v. Lockwood, 711 S.W.2d 545 (Mo. Ct. App. 1986) (Hospital was not liable for injuries to infant patient because the hospital had no duty to inform the infant patient's parents of the risks of surgery even though it furnished consent-to-surgery form); Roberson v. Menorah Medical Center, 588 S.W.2d 134, 138 (Mo. Ct. App. 1979) (Hospital did not assume the duty of informing the patient of the risks involved in the surgery simply because the hospital's nurse furnished the consent form to the Plaintiff).

As these Courts have held, "the presentation to the patient of risks involved in prospective surgery cannot but call for some very nice judgments" which "delicate medical judgments" are best reserved for a physician equipped with the requisite medical knowledge to handle such matters. Roberson at 137. See also Ackerman, supra at 320-321. The same "delicate medical judgments" are applicable to organ procurement. Nurse Guelbert was a hospital nurse and not an employee of MTS. Nurse Guelbert was not involved in the organ procurement activities of MTS and could not be expected to know what organs, bones or tissues MTS may find useful or how much tissue or bone may be necessary in a particular case. Nurse Guelbert did not assume a duty of

informing the Appellant of the full extent of MTS' activities simply because he was designated to request the Appellant's signature on the donation form.

The UAGA provides that a hospital is to designate one or more trained persons to "request" anatomical gifts. §194.233.1. Nurse Guelbert was designated to make the request for a donation to Appellant. Nurse Guelbert's only duty under the UAGA was to request Appellant's signature on the gift form. Like the surgical nurse, he did not assume, under the statute or under common law, the duty of fully informing the Appellant of the specifics of MTS' organ procurement activities.

Section 194.233 states that "Consent shall be obtained by the methods specified in Section 194.240." Section 194.240 provides that anatomical gifts may be made by will (subsection 1); a document other than a will (subsection 2); to a specified donee or the attending physician (subsection 3); by relatives or a guardian by a signed document or telegraphic, recorded telephonic or other recorded message (subsection 5); by completing the form on the back of one's driver's license (subsection 6); and by completing a department of health form (subsection 7).

Donation in this case was pursuant to subsection 5 of Section 194.240 and was effective upon Appellant signing the donation form. Nothing in the statute makes donation contingent upon informed consent. A donor who uses his will to make a donation is unlikely to have a transplant surgeon, an organ procurement agency or a requestor of anatomical gifts by his side when he makes a gift in his will. Similarly, when one executes the back of his driver's license and checks "any organ" is the taking

of bone pursuant to such a gift subject to later challenge by the donor's relatives because bone is not an organ? If the donation form signed by Appellant can be repudiated despite her signature, will not gifts made by a will or driver's license be equally subject to challenge? If so, organ donation in Missouri will be uncertain and thrown into chaos thereby defeating the entire purpose of the UAGA to encourage anatomical gifts for the greater benefit of society. The purpose of the original Uniform Anatomical Gift Act of 1968 was again reiterated in the 1987 UAGA and provides that, "Wherever adopted it will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures…It will provide a useful and uniform legal environment throughout the country for this new frontier of modern medicine." UNIF. ANATOMICAL GIFT ACT, Prefatory Note (1987).

Professional nursing is a compassionate and caring profession. That a nurse would be designated by a hospital to request a family, who has just lost a loved one, to donate the deceased's organs is understandable. But nurses are not transplant surgeons or specialists in harvesting organs. They are not trained in the delicate medical judgments used in procuring or transplanting organs. The UAGA does not create an independent cause of action against nurses who are designated to request donations and the common law of Missouri has long recognized that nurses are not liable for incomplete, inaccurate or uninformed consent, even though they may assist in obtaining the patient's signature on a form.

No cause of action lies against Nurse Guelbert in this case because there was no duty and without a duty negligence is irrelevant. The Trial Court did not err in granting summary judgment in favor of Nurse Guelbert and against Appellant and its decision should be affirmed.

CONCLUSION

The Trial Court did not err in granting summary judgment in favor of Respondent Christopher Guelbert, R.N. and against Appellant because the UAGA does not create an independent cause of action against individuals who request organ donations and under Missouri common law nurses do not owe a duty to patients or those acting on their behalf to obtain informed consent. For all of the foregoing reasons, the Missouri Nurses Association as *Amicus Curiae* in support of Respondent Christopher Guelbert, R.N. requests this Court to affirm the Trial Court's order granting summary judgment in favor of Respondent Guelbert.

Respectfully Submitted,

RICHARD D. WATTERS #27413
CHAD M. MOORE #51955
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (fax)

Attorneys for *Amicus Curiae*,
Missouri Nurses Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via Federal Express this 5th day of December, 2003 to:

Randall D. Sherman
Wegmann, Gasaway, Stewart, Schneider, Dieffenbach
Tesreau & Sherman, P.C.
P.O. Box 740
455 Maple Street
Hillsboro, MO 63050
Co-counsel for Respondent Jefferson Memorial Hospital

Couriered on the 8th day of December 2003 to:

Robert J. Lenze
Robert J. Lenze, P.C.
3703 Watson Road
St. Louis, MO 63109
Attorneys for Appellants

Edward S. Meyer
Rabbitt, Pitzer & Snodgrass, P.C.
800 Market Street, Suite 2300
St. Louis, MO 63101
Attorneys for Respondent Mid-America Transplant Services

Hand-delivered on the 8th day of December 2003 to:

Judith C. Brostron
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101
Attorneys for Respondent Jefferson Memorial Hospital

_____
Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That this brief complies with the limitations contained in Rule 84.06; and

2. This brief contains 400 lines and 3,390 words, excluding the cover, the certificate of service, and signature block, as determined by Word software; and

3. The floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

4. That two true and correct copies of this brief, and a floppy disk containing a copy of this brief, were served via Federal Express this 5th day of December, 2003 to:

   Randall D. Sherman
   Wegmann, Gasaway, Stewart, Schneider, Dieffenbach
   Tesreau & Sherman, P.C.
   P.O. Box 740
   455 Maple Street
   Hillsboro, MO 63050
   Co-counsel for Respondent Jefferson Memorial Hospital

   Couriered on the 8th day of December 2003 to:

   Robert J. Lenze
   Robert J. Lenze, P.C.
   3703 Watson Road
   St. Louis, MO 63109
   Attorneys for Appellants

   Edward S. Meyer
   Rabbitt, Pitzer & Snodgrass, P.C.
   800 Market Street, Suite 2300
   St. Louis, MO 63101
   Attorneys for Respondent Mid-America Transplant Services

Hand-delivered on the 8th day of December 2003 to:

Judith C. Brostron
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101
Attorneys for Respondent Jefferson Memorial Hospital

Richard D. Watters #27413
Chad Moore #51955
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314)621-2939 (Telephone)
(314)621-6844 (Facsimile)

Attorneys for *Amicus Curiae*